BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RICK D. SMITH Claimant	)	
VS.	)	Docket No. 1,013,724
TYSON FRESH MEATS, INC. Self-Insured Respondent	)	

ORDER

Respondent requested review of the July 25, 2005 Award by Administrative Law Judge Brad E. Avery. The Board heard oral argument on November 1, 2005.

APPEARANCES

Stanley R. Ausemus, of Emporia, Kansas, appeared for the claimant. Gregory D. Worth, of Roeland Park, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) found that claimant suffered an accidental injury which arose out of and in the course of his employment with respondent. The ALJ found that claimant was on the premises of respondent removing a safety boot worn for his protection when he injured his back. The ALJ adopted the assessment of Dr. Peter Bieri, the independent medical examiner, and awarded claimant a functional impairment of 15 percent to the body as a whole.

The respondent contends there is insufficient evidence to conclude that claimant's injuries were the result of a series of traumas and, instead, contends claimant suffered one specific incident of trauma on July 10, 2003. Respondent admits that incident occurred in the course of employment but denies it arose out of the employment. Respondent further contends that the July 10, 2003, incident, which occurred when claimant bent over to remove a shoe, is an act of day-to-day living and is not a personal injury as defined in the Workers Compensation Act. Respondent also argues that if the Board finds claimant's claim compensable, it should

find claimant had a 10 percent whole body impairment of function based on Dr. Jeffrey MacMillan's functional impairment rating, as he was the only rating physician to properly assign impairment by referencing the diagnosis related estimate (DRE) Categories of the AMA *Guides*[1].

Claimant requests that the Board affirm the ALJ but points out that claimant alleged a series of accidents in addition to the specific incident that occurred on July 10, 2003.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant has worked for Tyson for 11 years. During the times in question, he was a meat sorter, sorting shins and shanks. He testified that at times he would lift anywhere from 50 to 80 pounds. He would pick up the meat from a belt, throw it over his shoulder and carry it to another belt. The belts were approximately six or seven feet apart, and he would completely turn his body around, twisting his back.

In May 2003, claimant began experiencing pain in his lower back at work. He went to the nurse's office, and a nurse would put ice packs on him for 15 minutes a time, twice a day. He was not referred to a doctor.

On July 10, 2003, while still clocked in at work, claimant went to the locker room, bent over to untie his steel-toed boots and felt a snap. Pain went up through the back of his head, and he was unable to stand up. He sat in the locker room for 30 to 45 minutes before someone came in. At that time, two of his co-workers stood him up. Claimant walked around a bit and then went home. He indicated he felt pain in his back, belt high, running down his left leg down to the ankle.

The next day, claimant went to work and sat down in the cafeteria. When he did so, he felt another snap and felt pain in the same area as the day before. A co-worker helped him up, and he went to see his supervisor and told him he would not be able to work. He was sent to the nurse's office, and ice packs were applied to his back. He was there about an hour and was then taken to see Dr. Joseph Hutchinson, who ordered an MRI.

Claimant testified that he was provided a locker by respondent to keep his street clothes and shoes in. When he got to work in the morning, he would take off his street shoes and street clothes and put his work clothes and steel-toed boots on. Claimant said that he was

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[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

told to wear steel-toed boots where there was high forklift traffic and around machinery. Respondent provided rubber boots, but claimant got his own steel-toed boots. Claimant admitted that respondent did not require him to take off his boots after his shift and that he could leave the plant with the boots on. Claimant stated he takes the boots off because they stink.

Claimant was referred to Dr. MacMillan, a board certified orthopedic surgeon, who first saw claimant on July 25, 2003. Claimant gave a history of experiencing excruciating low back pain radiating down his left leg while sitting on a low locker bench. Claimant reported to Dr. MacMillan that he had been working full time at light duty. After examining claimant and reviewing MRI films ordered by Dr. Hutchinson, Dr. MacMillan diagnosed claimant with multi-level degenerative disc disease and herniation at L5-S1. Dr. MacMillan recommended claimant be treated with epidural steroid injections. Dr. MacMillan took claimant off work as being temporarily totally disabled.

When Dr. MacMillan saw claimant again on August 22, 2003, claimant reported he had two injections and had some improvement. At that time, Dr. MacMillan returned claimant to regular duty work. Dr. MacMillan saw claimant again on September 19, 2003, at which time claimant was complaining of low back pain with occasional radiation into both thighs. Dr. MacMillan continued to recommend conservative treatment. He again returned claimant to regular duty work without restrictions. However, when Dr. MacMillan examined claimant on October 17, 2003, claimant reported an increase of pain with symptoms radiating equally severe down both legs and said he had been having problems with bladder control. Fearing claimant would develop cauda equina syndrome, Dr. MacMillan recommended claimant undergo a laminotomy and diskectomy. The surgery was performed that same day.

Claimant's surgical report indicates that Dr. MacMillan found a "large osteophyte/hard disk."[2] Dr. MacMillan testified that in claimant's case, his herniated disk was largely calcified, so there was bone in it, which suggested that the herniation was quite old. Dr. MacMillan opined that when claimant bent over on July 10, 2003, he "twanged"[3] the nerve over the hard disk which gave him the onset of pain. The nerve was irritated, causing it to swell and give the kind of symptoms claimant complained of.

Claimant returned to Dr. MacMillan for follow-up. On March 25, 2003, Dr. MacMillan determined claimant had reached maximum medical improvement, and claimant indicated that he felt he was capable of returning to work. Dr. MacMillan, using the DRE Category III of the AMA *Guides*, opined that claimant had a 10 percent whole person impairment.

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[2]MacMillan Depo. (Ex. 3 at 8).

[3]MacMillan Depo. at 16.

Dr. MacMillan testified that because claimant had degenerative disc process in his spine, he was predisposed to a herniation of a disc and injury of the kind which occurred. Dr. MacMillan testified the injury could have occurred during any activity of daily living, such as getting up off the toilet or standing up out of a car.

Dr. Pedro Murati, board certified in physical medicine and rehabilitation, examined claimant at the request of claimant's attorney on March 10, 2004. Claimant complained of low back pain radiating into both legs. Claimant also told Dr. Murati he had occasional numbness and tingling down his right leg and felt like he had no strength in his legs. Dr. Murati diagnosed claimant with low back pain status post bilateral laminotomies, diskectomy, and foraminotomies, L5-S1. Using the AMA *Guides*, Dr. Murati opined that claimant fell into the DRE Lumbosacral Category IV and rated him as having a 20 percent whole person impairment.

When asked to explain his rating, Dr. Murati stated that claimant had surgery performed on both sides at L5-S1. Dr. Murati's physical examination of claimant showed objective findings for polyradiculopathy. The DRE Category III gives a 10 percent rating for a single radiculopathy. Dr. Murati admitted claimant did not have structural deficits as defined in DRE Category IV. However, Dr. Murati testified that the AMA *Guides* instruct physicians that if there is a question as to which of the categories the patient has, the physician should do a range of motion (ROM) evaluation and fit him in the category which is nearest the percentage arrived at using the ROM model. Dr. Murati did not do the ROM testing. Instead, he gave claimant a 10 percent rating from the surgery, a 6 percent rating from the radiculopathy problems on one side and a 4 percent rating from the radiculopathy problems on the opposite side. Those combined to a 18 percent whole person impairment, which was closer to a DRE Category IV than a DRE Category III. However, Dr. Murati said that if he had used the ROM model, the impairment would be higher.

Concerning the mechanics of the incident, Dr. Murati stated that most probably claimant had injured his disk somehow through the repetitive bending and had weakened the annulus fibrosus to a point that when he bent over to remove his boots, he sustained the herniation.

Dr. Peter Bieri, who is board certified in disability evaluation, performed an independent medical evaluation of claimant on October 15, 2004, at the request of the ALJ. Claimant gave him a history of developing progressive onset of back pain for two to three months and on July 10, 2003, while bending to change his work boots, he felt a snap in his low back. Dr. Bieri stated that bending over and changing his boots would be a normal activity of day-to-day living. Dr. Bieri testified that claimant's history of back pain for two to three months indicated he had some element of symptomatology consistent with an active process, with the final event being the snapping. Dr. Bieri testified the snapping sensation would be consistent with a herniation of a disk. Dr. Bieri rated claimant, using the ROM model in the AMA *Guides*, as having 11 percent whole person impairment for specific disorders of the lumbar spine at multiple levels and combined 5 percent whole person impairment for range of motion deficits of the lumbar spine, which calculated to a 15 percent impairment to the body as a whole.

Jonathan Pierce is employed by respondent and in July 2003 was claimant's supervisor. He testified the required personal protective equipment for workers in the trim department were earplugs, hard hat, cut resistant gloves for both hands and cotton gloves. He stated that steel-toed boots were never required of workers performing claimant's job.

On cross-examination, Mr. Pierce stated that if an employee operated a forklift, he or she would be required to wear steel-toed shoes. However, he testified that an employee is not required to wear steel-toed shoes in order to pass through the area where the forklifts are located. There is no policy that prohibits the wearing of steel toed shoes. Mr. Pierce stated that respondent provides lockers to each employee to be used for their everyday clothes. He also stated that it was not unusual for employees to change from their work clothes to their regular clothes, including shoes, before leaving work.

Claimant's original Application for Hearing alleged a single date of accident, specifically July 10, 2003. At the April 1, 2005, Regular Hearing, before any testimony was taken, claimant's counsel announced that he was amending the claim to allege a series of micro traumas.[4] There was no objection entered. Thereafter, on April 7, 2005, claimant filed an Amended Application for Hearing that alleged the dates of accident as: "A series of micro traumas commencing on or about May, 2003, and continuing each working day thereafter, and ending with [an] identifiable injury on or about 7-10, 2003, and continuing each working day after that."[5] Dr. MacMillan attributed the onset of claimant's symptoms to have been at work on July 10, 2003. However, on October 17, 2003, he obviously found that there had been a worsening after claimant was returned to regular duty work. Dr. Bieri and Dr. Murati believed claimant had suffered a series of work-related accidents, specifically noting the onset of claimant's low back symptoms in May 2003. The Board finds claimant suffered a series of work-related accidents ending on his last day worked before surgery, which appears to have been October 16, 2003.

Claimant bends over to tie or untie his shoes or boots every day at work and similarly when away from work. The injury, however, was an activity that arose out of the nature, condition, obligations, or incidents of the employment. The Board finds, therefore, that claimant's accidental injury is compensable because it did arise out of the employment.

The Workers Compensation Act (Act) states that the term "accident" should be construed in a manner to effectuate the Act's primary purpose that employers bear the expense of work related accidents. The Act provides:

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and **often, but not necessarily,**

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[4]R.H. Trans. (Apr. 1, 2005) at 6.

[5]Form K-WC E-1 (filed Apr. 7, 2005).

> **accompanied by a manifestation of force**. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate **the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.**[6] (Emphasis added.)

Respondent argues that claimant injured his back in an activity of daily living and, therefore, his back injury cannot be considered as having been caused by work, citing K.S.A. 44-508(e), which provides:

> "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. **An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.** (Emphasis added.)

Unfortunately, the Act does not define the phrase "normal activities of day-to-day living." Attempting to provide that phrase with a reasonable interpretation, the Board has previously held that K.S.A. 44-508(e) is a codification of the *Boeckmann*[7] decision where the Kansas Supreme Court denied benefits as Mr. Boeckmann's arthritic condition progressively worsened regardless of his activities. The court said:

> [T]here is no evidence here relating the origin of claimant's disability to trauma in the sense it was found to exist in *Winkelman*.[8] No outside thrust of traumatic force assailed or beat upon the workman's physical structure as happened in *Winkelman*.[9]

The *Boeckmann* case is distinguishable from this claim. The Board finds that claimant sustained repetitive work-related traumas to his back both before and after July 10, 2003. Those traumas aggravated his degenerative spine condition and were sufficient to require surgical repair of the herniated disk. Furthermore, on July 10, 2003, claimant sustained an identifiable work-related accident.

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[6] K.S.A. 44-508(d).

[7] *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

[8] *Winkelman v. Boeing Airplane Co.*, 166 Kan. 503, 203 P.2d 171 (1949).

[9] *Boeckmann*, 210 Kan. at 736.

An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment.[10] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[11]

Except as to the date of accident, the Board adopts the findings and conclusions of the ALJ as set out in the Award. The Board specifically agreed with and adopts the ALJ's decision to utilize the 15 percent impairment of function rating opinion of the court-ordered IME physician.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated July 25, 2005, is modified to find an accident date of October 16, 2003, but is otherwise affirmed.

IT IS SO ORDERED.

Dated this _____ day of November, 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[10] *Brobst v. Brighton Place North*, 24 Kan. App. 2d 766, 771, 955 P.2d 1315 (1997).

[11] *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).